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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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CURTIS MEEKS

v.

Docket No. 89-20-032

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Curtis Meeks is employed by Respondent Kanawha County Board of Education as a Custodian IV at Roosevelt Junior High School (RJHS). On October 28, 1988, he initiated this grievance at Level I. After denials there and at Level II¹ and waiver at Level III, Grievant filed his claim at Level IV on January 24, 1989. Hearing was conducted March 16, 1989,² and the parties agreed to submit post-hearing materials no later than April 7, 1989.³

¹ The Level II transcript is a part of the record.

² An earlier-scheduled hearing was continued upon Grievant's motion due to the unavailability of a witness. Respondent did not object to this delay.

³ Neither party submitted proposed findings of fact and
(Footnote Continued)

I. ORIGINAL GRIEVANCE

Grievant complained as follows:

I put in for a multi-class grounds crew job at Crede in July and Sept. The job was given to a person with less seniority in violation of my seniority rights. I am requesting the job plus back pay.

Respondent admitted that the successful applicant for the position, Mr. Curtis Nottingham, was a service employee with less seniority than Grievant, but justified its decision by reference to Grievant's work evaluation history, which it characterized as poor. It further cited W.Va. Code §18A-4-8b(b), which provides, in pertinent part:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment. . . on the basis of seniority, qualifications and evaluation of past service.

In March 1985, Grievant received an "unsatisfactory" evaluation indicating modest improvement over a month's time, but classifying his work as still unacceptable overall; continued employment was not recommended, although this was qualified somewhat. This review was conducted by Mr. William Godbey, Grievant's supervisor at the time. In May 1986, Ms. Patricia Petty, RJHS Principal and Grievant's supervisor since the 1985-86 school term, ranked him

(Footnote Continued)

conclusions of law, although Respondent indicated its approval of the findings and conclusions of the Level II Decision. Also, see n. 9, infra.

"unsatisfactory" in nine areas, although his summary rating was "satisfactory." In addition, she reprimanded him for posting political signs at RJHS and for related unauthorized use of the school's photocopier.⁴ In June 1987, Ms. Petty found Mr. Meeks "commendable" by formal evaluation; however, his mark dropped to "satisfactory" for his next review, conducted in April 1988. Significantly, in April 1988, Grievant's performance was classed "unsatisfactory" in these five areas: acceptance of change, attitude, public relations, employee relations, and leadership.

Respondent, acting upon a recommendation from its Superintendent of Schools, hired Mr. Nottingham for the multi-class grounds crew job at a public meeting on September 15, 1988. Grievant did not become aware of this until sometime in October despite earlier efforts to obtain this information and the successful applicant apparently did not start to work until October or later. It is undisputed that, at least before the initiation of this grievance, Respondent had not directly advised Grievant that the job for which he had applied was no longer available to him. Nevertheless, Respondent contended at Level IV that Grievant did not meet the timeliness requirements of Code

⁴ This reprimand was issued two days before the 1986 evaluation.

§18-29-4(a)⁵ in pursuing this claim and that it should therefore be denied.

At the hearing before this Grievance Board, Grievant presented the testimony of Ms. Petty, who stated that RJHS was cleaner and more ready for the start of the 1988-89 school year than she had ever seen it, and that she gave Grievant the credit for this. Interestingly, however, Ms. Petty opined the April 1988 evaluation of Grievant would not have justified his selection for the position in question since it is one of major supervisory responsibility.⁶

⁵ In pertinent part:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant. . . shall schedule a conference with the immediate supervisor. . . .

. . . . Within ten days of receipt of the response from immediate supervisor. . . a written grievance may be filed.

The Level II Decision was a denial of Grievant's case on timeliness grounds, although other issues were discussed and "ruled upon."

⁶ Grievant's current position is a supervisory one, but the multi-crew grounds job apparently has far greater responsibility.

Grievant also sought consideration of a November 4, 1988 evaluation from Ms. Petty which purported to rate him as an "outstanding" employee; however, because this document related in large part to Grievant's work performance after September 15, 1988, it was excluded from the record.

Also at Level IV, Grievant complained that his former supervisor Godbey's presence on the committee commissioned by Respondent to interview applicants chilled his chances of being selected. In fact, Respondent admitted that, based on Mr. Godbey's comments concerning Grievant, it decided not to even interview him for the job.

Further remarks on this aspect of Grievant's case may be found in the formal findings of fact and conclusions of law of this Decision, infra.

II. LEVEL II TRANSCRIPT COST

At the conclusion of the Level IV hearing, counsel for Grievant produced a bill for \$28.50 presented to her by Respondent for its costs in preparing the original Level II transcript of this case, which it did at her request on Grievant's behalf. She argued that W.Va. Code §§18-29-1 et seq. mandate that county boards of education in West Virginia provide such a transcript gratis to grievants, and further cited District 1199 WV/KY/OH v. W.Va. Dept. of Health, 377 S.E.2d 498 (W.Va. 1988).

W.Va. Code §§18-29-3(j) provides, in pertinent part:

Once a grievance has been filed, supportive or corroborative evidence may be presented at any. . . hearing conducted. . . . Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented [Hearing Examiner if at Level IV]. If the grievance evaluator rules that the evidence renders it a different grievance, . . . [he or she] may decide to hear the evidence. . . .

Grievant's disagreement with Respondent over responsibility for the Level II transcript expense, while clearly related to his complaint concerning non-selection, is a new and separate grievance. Despite this, Grievant has never formally submitted it, pursuant to W.Va. Code §§29-6A-1 et seq., for lower level consideration. However, the two claims are closely intertwined; furthermore, Respondent has recently determined in keeping with its longstanding policy, see infra, that Grievant should pay for the transcript, and it is unlikely that requiring this matter to be heard at Levels I, II or III would be more than a pro forma exercise in futility.⁷ Accordingly, it is ruled that Grievant's transcript cost contention is appropriately before this Grievance Board and, per Code §18-29-5(b), it is consolidated with and made a part of his grievance as originally filed.

The District 1199 case held:

The aggrieved employee has the right to use, free of charge, the employer's copy machine for the purpose of copying the grievance documents and the transcript of the employment grievance hearing.

Syl. Pt. 2.⁸

⁷ See State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 438 (W.Va. 1986).

⁸ The District 1199 court actually confronted two separate issues, i.e., the employer's obligation to allow employee access to equipment for copying grievance forms, and the similar obligation regarding hearing transcripts, but did so with a consolidated analysis. See Syl. Pt. 2; 377 S.E.2d 500-501.

Respondent argued⁹ that neither District 1199, by analogy, nor Code §§18-29-1 et seq., by explicit direction, requires a board of education in West Virginia to prepare and provide an original Level II or III transcript, free of charge, merely upon request. Respondent further explained its practice since the inception of the education employees grievance procedure, July 1, 1985, has been,

1. Kanawha County Schools desires a transcript--the full cost is borne by the county;

2. Kanawha County Schools and grievant(s) desire a transcript--the cost is shared;

3. Grievant makes a unilateral request that a hearing be transcribed--a cost of \$1.60/page is imposed; and,

4. Kanawha County Schools provides copies of mechanical recording of grievance hearing free upon request.

Respondent added that, in cases where transcripts already exist, employees may use photocopying equipment without cost to make duplicates of those transcripts. It also represented that \$1.60 per page is a comparable rate for transcription services in this general geographical area, and Grievant failed to rebut this statement in any way.

W.Va. Code §18-29-6 provides, in pertinent part:

All the testimony and evidence at any hearing [at levels two or three] shall be recorded by mechani-

⁹ Respondent presented its "Memorandum" on the law relating to transcript costs April 5, 1989. Counsel for Grievant, on the other hand, failed to timely submit a brief on this issue.

cal means, and all recorded testimony and evidence at such hearing shall be transcribed and certified at the request of any party to the institution or board [of education]. The institution shall be responsible for promptly transcribing the testimony and evidence and for providing a copy of the certified transcription to the party requesting same. The hearing examiner may also request and be provided a transcript. . .[at] level four and allocate the costs therefor as prescribed in. . .[W.Va. Code] §18-29-8.

. . .

. . .[T]he mechanical recording of all testimony and evidence or the transcription thereof, if any; the decision; and any other materials considered in reaching the decision shall be made a part and shall constitute the record of a grievance. Such record shall be submitted to any level at which appeal has been made, and such record shall be considered, but the development of such record shall not be limited thereby.

Code §18-29-8 provides:

Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses.

It is noted that the West Virginia Legislature did not identify employers as the sole underwriters of employee grievance expenses, including those related to lower level transcripts. See Code §18-29-6. Indeed, §§18-29-6, 18-29-8 instruct that any party, including a grievant, may be required to bear certain costs incurred in the processing of his or her claim. The District 1199 case, based not on education employee grievance law but on the similar state employee grievance procedure,¹⁰ found state employers

¹⁰ While West Virginia education employee and state employee law are parallel in many particulars, certain
(Footnote Continued)

required to provide free access to photocopying equipment so that grievants could reproduce transcripts, reasoning that:

No outside expense was incurred by the grievant's use of. . .[the copy machine], and, therefore, we do not believe that the grievant has incurred an expense which would trigger W.Va. Code §29-6A-8. . . .

At 500.

In arriving at this conclusion, the Court compared the copy machine with grievance forms and noted "[b]oth the forms and the equipment, such as the copy machine, are items which are maintained by the employer for the regular use of the agency."¹¹ It further relied upon Code §29-6A-3(1), which grants a "grievant. . .access to the employer's equipment for purposes of preparing documents. . . ."¹²

(Footnote Continued)

differences pertinent to this case are noted. Cf. Code §§18-29-6, 29-6A-6. Accordingly, this Decision should not necessarily be considered an indication of how a like issue might be resolved in a state employee's case.

¹¹ In this regard, see W.Va. Code §29-6A-3(1). The Court, in District 1199, was not forced to deal with this issue in the context of an employer without a copier or other necessary office equipment "maintained. . .for the regular use of the agency."

¹² Grievant has not argued, based on Code §18-29-3(1), that he would have been entitled to use of Respondent's office equipment to prepare the original transcript himself.

It is noted that the 1199 Court found the §29-6A-6 requirement that a state employer "promptly provide[e]. . .a copy of the certified transcript of a level three hearing to any party to that hearing who requests such transcript" was met by "loaning" that party the already-prepared official transcription and allowing her or him access to an in-house copier. It would seem any like requirement imposed upon education employers by Code §18-29-6 could certainly be satisfied in the same manner.

It is significant that in District 1199 a transcript had already been constructed prior to the dispute over availability of a copy thereof for the grievant. In the instant case, the transcript exists only because the Grievant desired its preparation. The Supreme Court in District 1199 made pointed reference to the fact that W.Va. Code §29-6A-4 "does not require that either party obtain a certified copy of the transcript prior to taking an appeal from that decision" (emphasis supplied). This Grievance Board takes notice that the expense of preparing an original transcript, both in time and money, is far greater than that of allowing a grievant to use an in-office photocopying machine to duplicate such a transcript. Also in District 1199 the Court suggested that when "outside expense" is incurred the party causing the same should be responsible therefor. It is clear that the emphasis was on costs beyond an employer's normal budget items and routine work responsibilities.

It is important to recognize that Code §§18-29-1 et seq. are applied liberally to allow maximal access to grievants for their employment-related complaints.¹³ There is no provision in §§18-29-1 et seq. for the dismissal of frivolous or meritless claims, and generally speaking, such must be processed with the same attention as cases of

¹³ Hayes v. DNR, Docket No. NR-88-038 (Mar. 28, 1989).

substance. If that same law also required respondents to maintain staff and equipment for the preparation of original, certified hearing transcripts free of charge whenever any employee-grievant demanded the same for any reason, no matter how trivial, or for no reason whatsoever, the administrative burden in time and finances would be potentially crippling. It simply could not have been the intent of the Legislature to authorize such overexpenditure of resources and attendant possible injury to respondents and indeed, to the continued maintenance and effectiveness of the education employees grievance system.¹⁴ However, when an employer has chosen to assign personnel, as part of their regular duties, and equipment to the original, official transcription of grievance hearings, no outside expense is created when such a transcript is prepared.¹⁵ In the instant case, the Level

¹⁴ It is noted that a grievant who can demonstrate just cause for needing a Level II or III transcript, but cannot afford the cost involved, may always seek relief on that basis.

¹⁵ It seems that outside expense would be incurred even if a respondent's in-house employees actually performed original, official transcription of such hearings, once that was requested pursuant to Code §18-29-4, unless that respondent had staff with these duties within their regular job descriptions and attendant access to needed equipment. It might also be created in a given case if such staff and equipment was kept but the respondent reasonably had to utilize extra-agency personnel and/or equipment.

The undersigned notes that county boards of education in West Virginia have rather broad authority to collect or receive funds generated by "endeavors of any nature operated or carried on by or in the name of. . . school[s], or any organization or body directly connected with school[s],
(Footnote Continued)

II hearing was originally "[r]ecorded and transcribed by [Respondent's employee] Brenda J. Petry, Electronic Recording Technician/Executive Secretary II."

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed as a Custodian IV for Respondent Kanawha County Board of Education. During July 1988, and perhaps again in September 1988, he bid on a multi-class grounds crew position.

2. Grievant had an unsatisfactory evaluation of his employment with Respondent, dated 1985; a 1986 satisfactory rating, with several areas noted as deficient; a 1987 commendable summary; and his most recent evaluation before the selection of Nottingham, one of April 1988, was only satisfactory, with five key areas rated "unsatisfactory," including attitude, employee relations and leadership.¹⁶

(Footnote Continued)

[and] to audit such records and to conserve such funds. . . ." W.Va. Code §18-5-13(1).

¹⁶ The fact that Grievant was promoted from Custodian III to Custodian IV, while the 1985 evaluation was the most recent one in his personnel file, is surprising but is not sound basis for considering the 1988 evaluation as
(Footnote Continued)

3. Based on the comments of Mr. Godbey, who had been his supervisor in 1985 and not since, Grievant was not interviewed for the position.

4. Another of Respondent's service employees, Curtis Nottingham, who had less seniority than Grievant, was chosen for the job on September 15, 1988, at an open meeting. Had Grievant been selected, it would have meant a promotion for him.

5. Despite reasonable attempts to learn the outcome of the process sooner, it was mid-October before Grievant became aware he had not been successful in his application.

6. Grievant presented no evidence that Mr. Nottingham's evaluations had ever been unacceptable, or that he was otherwise not qualified, for the position of multi-class grounds crew supervisor.

7. Upon Grievant's unilateral request, Respondent prepared an original, certified transcript of the Level II hearing in this matter and presented Grievant a bill for \$28.50 therefor, which reflects the prevailing rate for transcription services in this area, \$1.60 per page.

8. Respondent maintains personnel and equipment to create official, original transcriptions of lower level grievance hearings, and the Level II transcript in this case was prepared by such personnel, using such equipment.

(Footnote Continued)

supportive of his application for the multi-class grounds crew post, as he argues it to be.

CONCLUSIONS OF LAW

1. This grievance was timely filed per Code §18-29-4, in that Grievant made reasonable efforts to learn the outcome of the job selection process for multi-class grounds crew supervisor, but was unaware of that outcome until October 12, 1988.¹⁷

2. "County boards of education have substantial discretion in matters relating to the hiring. . .and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary or capricious." Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58, 64-65 (W.Va. 1986) (citations omitted).

3. "A county board of education shall make decisions affecting promotion and filling of any service personnel positions. . .on the basis of seniority, qualifications and evaluation of past service." W.Va. Code §18A-4-8b(b).

4. A grievant has the burden of proving the allegations of his claim by a preponderance of the evidence.

¹⁷ In certain analogous employment law contexts, "the time period for filing a complaint" has been held to "ordinarily begin[] to run on the date when the employer unequivocally notifies the employee of the. . . decision." See Indep. Fire Co. v. Human Rights Comm'n, 376 S.E.2d 612, 617 (W.Va. 1988), and cases cited. One of those cases, Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), cited in Indep. Fire Co. at 616, pointed out, at n. 9, that limitation periods "should not commence to run so soon that it becomes difficult for a layman to invoke the protection of. . .[relevant] statutes."

Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-107 (Nov. 7, 1988). In this case, Grievant has failed to meet this burden with regard to his non-selection for the multi-grounds crew post, for reasons including his most recent relevant performance evaluation of "unsatisfactory" in several key areas, e.g., leadership and employee relations.¹⁸

5. W.Va. Code §18-29-6 requires a county board of education to transcribe and certify, or to have transcribed and certified, any Level II or III hearing "at the request of any party." This section also authorizes a Level IV Hearing Examiner to order the preparation of a Level II or III transcript, and to "allocate the costs therefor as prescribed in" Code §18-29-8. The law, in and of itself, never insists on the preparation of a transcript for purposes of appeal or compilation of the record. Code §§18-29-4, 18-29-6.

6. Code §18-29-8 provides that "[a]ny expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such

¹⁸ While Respondent's choice not to interview Grievant on the basis of Mr. Godbey's advice was clearly questionable, even if Grievant had been interviewed, this evaluation would still have been sufficient reason for the rejection of his application. Grievant's contention that Respondent had an obligation to consult with his current supervisor, since it considered the advice of a past supervisor, is without merit, especially since written evaluations by both those individuals were available for review.

expenses." In this regard, "outside expense" created by a grievant's unilateral request for original transcription of a Level II or Level III transcript when the respondent does not in the normal course of business maintain equipment and personnel for official transcription must be paid by the grievant. See District 1199 WV/KY/OH v. W.Va. Dept. of Health, 377 S.E.2d 498 (W.Va. 1988).

7. W.Va. Code §§18-29-1 et seq. does not mandate that a county board of education prepare or have prepared an original Level II or III hearing transcript to a grievant, upon his or her request therefor, free of charge. Instead, when outside expense is incurred, a county board of education may require a requesting grievant to pay for such transcript, at the prevailing rate, if it is the grievant alone and not the respondent who desires the transcript.¹⁹ If both parties are in need of a transcript, the outside expense of transcription should be borne half by the grievant(s) and half by the respondent(s). W.Va. Code §18-29-8; see Code §18-29-6; cf. Code §29-6A-6.

8. Once a grievant has established that he or she has requested his or her employer to prepare a lower level

¹⁹ The Kanawha County Board of Education, in its offer to provide any Level II or III hearing tapes gratis, and to allow the free use of photocopying equipment for reproduction of any existing transcript, actually goes beyond what is required in state employee grievance situations by District 1199.

hearing transcript, the burden of producing evidence of outside expense shifts to the respondent. In this case, Respondent did not show outside expense; to the contrary, the record reflects none was incurred.²⁰

Accordingly, this grievance is **DENIED** insofar as Grievant seeks instatement as multi-class grounds crew supervisor, or other relief related to that position, and **GRANTED** insofar as he seeks relief from \$28.50 in financial liability for preparation of the original, certified Level II transcript in this case which he, through his counsel, requested.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named.

²⁰ This Decision should not be read to bootstrap an employer's ability to have a staff secretary transcribe hearing testimony excerpts in rough form for in-office or other unofficial use. It is only when certified, original transcripts are prepared by staff and equipment maintained for such purposes that the principles of this case come into play.

Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in cursive script, appearing to read "M. Drew Crislip", written over a horizontal line.

M. DREW CRISLIP
HEARING EXAMINER

Dated: May 19, 1989